(24)

Supreme Court, U.S.
FILED
SEP 10 2003
OFFICE OF THE CLERK

No. 02-626

IN THE

Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE UTILITY WATER ACT GROUP AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

33 pp

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BRIEF FOR THE UTILITY WATER ACT GROUP AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

INTEREST OF *AMICUS*

Amicus Utility Water Act Group (UWAG) represents the electric power industry in this country.[1] UWAG is an association of 158 individual electric utilities and three national trade associations of electric utilities, the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. The individual utility companies operate power plants and other facilities that generate, transmit, and distribute elec-

[1] Pursuant to Rule 37.6 of this Court, *amicus* states that its counsel authored this brief, and *amicus* paid for it. This brief was not written in whole or in part by counsel for a party, and no one other than *amicus* made a monetary contribution to its preparation.

tricity to residential, commercial, industrial, and institutional customers. The Edison Electric Institute is the association of U.S. shareholder-owned electric companies, international affiliates, and industry associates. The National Rural Electric Cooperative Association is the association of nonprofit electric cooperatives supplying central station service through generation, transmission, and distribution of electricity to rural areas of the United States. The American Public Power Association is the national trade association that represents publicly owned electric utilities in the United States. UWAG's purpose is to participate on behalf of its members in the United States Environmental Protection Agency's (EPA's) rulemakings under the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994 & Supp. V 2000), and in litigation arising from those rulemakings.

The electric power industry generates and distributes the electric energy that is a foundation of the American economy, more so with every passing year of the computer age. We will refer to ourselves as the "Power Companies." Electricity is so important that, like water, there is a legal duty to supply it to the public.

The Power Companies urge the Court to reverse the Eleventh Circuit's *Miccosukee* decision. *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002), *cert. granted*, 123 S. Ct. 2638 (2003). That decision stretches the term "discharge of pollutants" (and indeed the entire Clean Water Act permitting program) well past the breaking point, proposing to require water users to remove pollutants contributed by natural causes or by other persons and threatening years of settled law affecting power facilities. In so doing, the decision unduly constrains prudent State and local management of the water resources on which power generation by hydroelectric and steam electric generating facilities rely, ignoring the

Clean Water Act's explicit reservation of that authority to the States.

The Power Companies have two particular concerns. The first is hydroelectric facilities. A hydroelectric dam releases water through the dam's turbines to generate power. That water always contains background pollutants to begin with, and the mere process of passing water through turbines may change the quality of the water. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 161-164 (D.C. Cir. 1982), and *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 82 F.2d 580 (6th Cir. 1988). Nevertheless, passing the water through the dam to the river below has never been considered a "discharge of a pollutant" requiring an NPDES permit, and two courts of appeals have so held, as explained below. The *Miccosukee* decision, while not directly addressing dams, correctly recognizes EPA's policy that hydropower facilities do not require permits for the discharge of pollutants, and this Court should likewise not disturb this longstanding precedent, especially since dams are already comprehensively regulated to protect water quality. In particular, in the wake of the Court's decision in *PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology*, 511 U.S. 700 (1994), hydropower projects licensed by the Federal Energy Regulatory Commission are subject to extensive federal and state water quality reviews and license conditions under section 401 of the Clean Water Act as well as under the Federal Power Act, Endangered Species Act, and National Environmental Policy Act. To add yet another layer of water quality review by the same agencies under the same Clean Water Act would be unwarranted and inappropriate.

Second, the Power Companies are concerned about the decision's effect on the availability of water to disperse waste heat from the electricity generating process. Many steam electric power plants withdraw once-through cooling water, which they use to condense and cool steam after it generates

electricity. Some power plants use "closed-cycle cooling" (cooling towers), for which they still need to withdraw water (though in smaller quantities) from a river or a lake. In either case, the cooling water is returned to a receiving waterbody, typically though not always the same waterbody from which it came.

The Power Companies rely on State and local water managers to consider their cooling water and process water needs and any water rights to which they are entitled by operation of law or contract to ensure that essential water resources are available. The Eleventh Circuit's opinion, by raising doubts about a water user's responsibility for pollutants he or she did not add, jeopardizes that reliance.

INTRODUCTION

The Eleventh Circuit's *Miccosukee* decision is a radical one. It holds that "[w]hen a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed," that action itself is a "discharge of pollutants" because it is the "cause-in-fact of the discharge of pollutants." *Miccosukee*, 280 F.3d at 1368. In reaching this conclusion the court made several errors.

First, the court determined, apparently as a matter of law, that the water segments from and to which the water is pumped in this Florida locale are "separate and distinct." *Id.* at 1369 n.8. The court ignored the fact that the S-9 pumping station did not by itself cause the change in the "natural" flow of waters that once intermingled. And it made no attempt to inquire whether, under governing State law, the water segments should be considered part of the same "body of water."

Second, the court created its own interpretation of the statutory term "discharge of pollutants," ignoring the plain language and structure of the statute as well as EPA's longstanding interpretation of the term and well-established judicial precedents accepting EPA's interpretation.

Section 402 of the Clean Water Act, 33 U.S.C. § 1342 (1994), requiring NPDES ("National Pollutant Discharge Elimination System") permits for the "discharge of a pollutant," is a provision for permitting the release of pollutants from industrial plants and municipal wastewater treatment works, and it has been interpreted that way for 30 years. Other provisions of the statute, as well as the structure of the Act generally and the NPDES program specifically, support the view that NPDES permit requirements were never intended to constrain water resource management, even assuming, for the sake of argument, that a transfer of water between two legally distinct waterbodies has occurred.

Yet the Eleventh Circuit opinion could be interpreted to make illegal, without an NPDES permit, virtually all use and management of water unless the water ends up back in the "same body of water" (as judged by the court, not the State or the permit writer) from which it was taken. This would make any movement of water to what a court deems a "distinct waterbody" subject to federal oversight and possible veto, and to the particular mechanisms of the NPDES permit program such as "technology-based" permit limits, which are clearly inappropriate for transfers of water.

Water itself is not a pollutant. *Bettis v. Ontario*, 800 F. Supp. 1113, 1119 (W.D.N.Y. 1992). But all water, everywhere, contains substances that would be "pollutants" if added to water by a point source. Some are waste products added by humans. Some are added by Nature. Some occur as a result of conditions instream, including hydrological changes or rerouting attributable to humans. It is clear from

both the plain language of the statute and its structure that only the first of these causes—the addition of one or more of the statutorily enumerated "pollutants" to "navigable water" and only if "from" a "point source"—is subject to the prohibition against the "discharge of pollutants" to which NPDES permit requirements apply.

There is no dispute in this case about whether the South Florida Water Management District ("Water Management District" or "the District") added any pollutants to the water it was charged by the State with managing—it did not. Yet because a pollutant (phosphorous) was present in the water as a result of natural causes or other point or nonpoint sources, the Eleventh Circuit has decided to treat that water itself as a pollutant and its management within the Everglades as a "discharge of pollutants." The court is incorrect on both counts.

ARGUMENT

According to the Clean Water Act, the action that requires a permit is the "addition" of a "pollutant" "to" navigable waters "from" a "point source." Clean Water Act § 502(12), 33 U.S.C. § 1362(12) (1994). (The definition of "pollutant," 33 U.S.C. § 1362(6), says "into" water.) The question raised by the *Miccosukee* decision is whether a "discharge of pollutants" occurs when humans merely *move* water that already contains pollutants.

Even if we were to accept for the sake of argument, which we do not, that the two sides of the levees in this case were properly treated as legally distinct despite the historical connection of the areas, the plain language and structure of the Act show that water management activities of this kind are not subject to NPDES permitting requirements. The water pumped by the Water Management District was not itself a "pollutant" as the statute defines that term. And even though the water contained pollutants added by other point or

nonpoint sources, no "addition from" the point source at issue here (the S-9 pumping station) occurred.

The court's conclusion to the contrary rests on its own reinterpretation of the phrase "addition from." The court chose to reject EPA's longstanding interpretation and well-established precedent finding that EPA's interpretation is reasonable. Also, the court did not discuss (and apparently never considered) other provisions of the statute that reserve to the State authority over water resource allocation and management and that describe flow diversions as causes of "pollution," not discharges of "pollutants." And in construing "discharge of pollutants" to include actions designed to manage the flows of already polluted waters, the court never stopped to consider whether its view of the scope of the NPDES program was consistent with the larger structure of the Clean Water Act or whether there might be due process problems with such a sweeping view. Also, as we have mentioned, the court made a legal determination that the C-11 Basin and the WCA-3A area are distinct, without any discussion of relevant State or federal law.

For these reasons, which we will elaborate on in the rest of this brief, the Power Companies urge the Court to overturn the Eleventh Circuit's decision in this case and to clarify that no NPDES permit is required for transfers of water of the sort involved in this case. Even if the Court does not overturn the decision below, we encourage the Court (1) to take great care not to upset settled law as to hydropower projects, namely the *Gorsuch* and *Consumers Power* decisions cited above, and (2) to keep the focus of the decision narrow and not venture into other issues that also are not before the Court.

Specifically, if the Court does not overturn the Eleventh Circuit's decision, the Court need not and should not reach a related but distinct question that is not presented on the facts here: Where (unlike here) a point source discharge of pollutants actually occurs, is the point source responsible not

only for the pollutants it adds but also for other pollutants that it does not add but that are present in its source or "intake" water? The only court to have squarely considered this question concluded that point sources are not responsible for such "intake pollutants." *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976). Other courts, asked to opine on the validity of EPA's "intake credit" rules, have found those rules unripe for review. *See American Iron & Steel Institute v. EPA*, 115 F.3d 979, 998-99 (D.C. Cir. 1997); *Natural Resources Defense Council, Inc. v. U.S. EPA*, 859 F.2d 156, 204-05 (D.C. Cir. 1988); *Diamond Shamrock Corp. v. Costle*, 580 F.2d 670, 674 (D.C. Cir. 1978).

The Power Companies do not believe that this case is a suitable setting for engaging this important question. We note, however, that the Eleventh Circuit's decision in *Miccosukee* raises the same types of jurisdictional and due process concerns that are raised by the "net/gross" issue.

I. THE TRANSFER OF WATER FROM ONE PLACE TO ANOTHER DOES NOT CHANGE THE WATER INTO A "POLLUTANT" OR MAKE THE TRANSFER AN "ADDITION" OF A "POLLUTANT"

If merely collecting and pumping polluted water required a Clean Water Act permit, then anyone who moved water from one place to another, even if the water was not a waste product and the user had introduced no substances of any kind, would need a permit.

The implications of such a result would be disturbing, simply because *all* water contains substances, some of which may well be "pollutants" from many sources. This means that all transfers of water to a different waterbody, under the Eleventh Circuit's reasoning, would be illegal without an NPDES permit, thereby transforming even purely intrastate water resource management decisions into functions that the

federal government would have to oversee through the NPDES permit program.[2] This plainly is not what the Clean Water Act anticipates.

A. No Matter How Pristine, Water Is Never Entirely Free of "Pollutants"

The nation's waters, no matter how untouched by humans, have never been pure like distilled water[3]. To the contrary, all natural water contains substances, some "good" and some "bad," depending on the context.

Many substances are added to water by nature.[4] Coliform bacteria come from the digestive tracts of birds, deer, and beaver. Other naturally occurring substances leach out of soil or rock and into the water. As many as 50 minerals occur

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[2] Typically it is the State, not the federal government, that administers the NPDES permit program. But even so, a State-issued NPDES permit is subject to review and disapproval by EPA. More important, the *mechanism* for regulating the water is the particular type of permit, with measures such as technology-based permit limits, prescribed by the federal statute. This is an enormous change from allowing States to regulate water resources in their own ways.

[3] Even the purest water (used, for example, in the semiconductor and pharmaceutical industries or in laboratories) is not free of contaminants. Type I or ultrapure water is the most pure reagent-grade water for laboratories. For practical purposes, Type I water has a specific resistance of at least 18 megohms-cm and meets other criteria for specific conductance (micromhos per centimeter), total silica, total organic carbon, and bacterial count. *See* Michael Brush, *Water, Water, Everywhere*, 12 *THE SCIENTIST 18* (June 8, 1998), *available at* http://www.the-scientist.com/yr1998/june/profile1_980608.html.

[4] *See generally* Gilbert M. Masters, *Introduction to Environmental Engineering and Science* 107-09 (1991) (naturally occurring organic matter, protozoa from wild animals); EPA, Sole Source Aquifer Petition, 52 Fed. Reg. 37,010 col. 2 (Oct. 2, 1987) (final determination) (dolomite); John T. Holleman, *In Arkansas Which Comes First, the Chicken or the Environment?*, 6 TUL. ENVTL. L.J. 21, 29 (1992) (coliform bacteria in warm-blooded animals).

naturally in water, including calcium, magnesium, silica, and fluoride. A river with a bed of dolomite will contain calcium and magnesium. Streams pick up organic acids as they flow through swamps or sulfur from sulfur springs. Phosphorous in water can come from human sources (fertilizer) or natural ones, such as weathering of phosphate rocks and bird guano.

Also, pollutants are added by events, both natural and human. Man may add wastes from point sources or nonpoint sources. A variety of substances, some natural and some manmade, settle onto the water from the air. To give just one example, rainwater falling through air picks up carbon dioxide and becomes weak carbonic acid, which can slowly dissolve limestone. By this means many of the country's caves were created. Sunlight heats the water. Severe weather creates turbidity. The variety of changes that can occur is endless and, of course, constantly changing.

B. That Water is Polluted Does Not Make It a "Pollutant" Under the Clean Water Act, and the Transfer of Such Water From One Watercourse to Another Is Not the "Addition" of a Pollutant

Section 502 of the Clean Water Act defines "pollutant' as a waste material discharged into water:

> The term pollutant means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

Clean Water Act, 33 U.S.C. 1362(6) (Supp. V 2000).

This definition is broad but by no means unlimited. This Court has recognized that use of the restrictive term "means" instead of the looser phrase "includes" generally indicates Congress' intent to exclude any meaning that is not stated. *Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979) (citations omitted); s*ee also Gorsuch*, 693 F.2d at 172.

The specific items Congress chose to list share one important characteristic: they are all "waste material of a human or industrial process." *Ass'n to Protect Hammersley, Eld & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1016 (9th Cir. 2002). Notably, the list does not include already polluted natural waters. Instead, what Congress intended to prohibit, absent a permit, was the addition to navigable waters of one or more of the enumerated manmade waste materials from a point source.

Here the Water Management District added no waste material to navigable waters. Everyone agrees that any waste material present in the waters managed by the District was added by other sources. *Miccosukee*, 280 F.3d at 1366. Some of that waste material may have been added from permitted point sources; some from unpermitted "nonpoint" sources like fertilizer on farmers' fields, which are controlled by States under Clean Water Act provisions other than the NPDES permit requirement; and some from natural causes.

The Eleventh Circuit says that an "addition" of manmade wastes "to navigable waters" "from" a point source occurs each time those wastes pass from one "distinct" watercourse

to another via a point source. *Id.* at 1368-69. Under this theory, only the receiving waterbody is a "navigable water." *Id.* at 1368. In effect, the source water becomes the "pollutant."

There is no support in the statute for such an interpretation, and the Eleven Circuit cites none. Instead, as support for its decision, the court cites three cases: *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d. Cir. 2001); *Dubois v United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996); and *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501 (11th Cir. 1985) (history omitted).

The court's reliance on *Dubois* and *M.C.C.* is misplaced. In both cases the point source in question itself "added" material that at least arguably met the definition of "pollutant."

In *Dubois* the point source took water from one navigable water, used it in its snowmaking equipment, and discharged it to another navigable water. The parties contested whether pollutants were added during the snowmaking process, but the First Circuit did not reach that issue because it found, in effect, that the source water had ceased to be a "navigable water" and became a wastewater when it was taken out of navigable waters and used by humans. *Dubois*, 102 F.3d at 1296-97. Even if *Dubois* is correct, it is readily distinguishable from the *Miccosukee* case. In *Dubois* the water was removed from the waterbody, made into snow, used for a commercial purpose, melted, and returned to the waterbody; in *Miccosukee* the water was merely pumped through a manmade structure to a different location.

In *M.C.C.* boat propellers ripped up bottom sediments, allegedly to create a channel and redeposit the unwanted "dredged material" outside the channel. *M.C.C.*, 772 F.2d at 1505-06. Thus, while the critical statutory element of an

addition "into" water was missing, at least the activity being regulated was the disposal of waste (dredged spoil), not the mere movement of water as in this case.

Only the Second Circuit's decision in *Catskill Mountains* fits the analytical framework adopted by the Eleventh Circuit in *Miccosukee*. The Power Companies believe that in both cases that analysis is, quite simply, wrong. As we discuss below, neither court adequately considered EPA's long-standing interpretation of the statutory terms, which has been reviewed and upheld by Courts of Appeals for both the D.C. Circuit and the Sixth Circuit. In a rush to require a permit, neither court looked at whether the NPDES permit program is designed to regulate the activity in question. And neither court adequately considered other statutory provisions that indicate Congress' intent to treat water management activities of this kind as "nonpoint" sources and to leave water resource allocation to the States.

II. THE ELEVENTH CIRCUIT IMPROPERLY IGNORED OR REJECTED LONGSTANDING PRECEDENTS RELEVANT TO THIS ISSUE, INCLUDING EPA'S OWN INTERPRETATION OF ITS JURISDICTION

EPA has never interpreted the term "discharge of pollutants" to include transfers of navigable waters, even between two distinct segments. Indeed, it has been EPA's longstanding position, articulated contemporaneously with the passage of the statute, that an "addition of pollutants to navigable waters from a point source" occurs when a point source from outside navigable waters introduces a material meeting the definition of a "pollutant" into navigable waters. EPA has fully articulated this position, reflecting its interpretation both of the statute and its NPDES rules implementing the statute (40 C.F.R. Part 122 (2002)), in cases

contesting its decision not to require NPDES permits for hydroelectric dams.

As EPA has said and the courts have long recognized, the term "addition from" is a limiting factor, used to distinguish pollutants that are added—and therefore subject to regulation—from those that merely pass through a point source:

> [I]t does not appear that Congress wanted to apply the NPDES system wherever feasible. Had it wanted to do so, it could easily have chosen suitable language, *e.g.*, "all pollution released through a point source." Instead, as we have seen, the NPDES system was limited to "addition" of "pollutants" "from" a point source.

Gorsuch, 693 F.2d at 176. Indeed, EPA itself argued in *Gorsuch* that "any addition must occur 'from' a point source and not merely through a point source." *Id.* at 175 n.58. EPA explained that "the point or nonpoint character of pollution is established when the pollutant *first* enters navigable water, and does not change when the polluted water later *passes* . . . from one body of navigable water . . . to another . . . ." *Id.* at 175 (characterizing EPA's argument) (emphasis added).

EPA has articulated its position in a variety of documents stemming back very nearly to the passage of the Act. *See Gorsuch*, 693 F.2d at 167 n.33 (discussing EPA's consistent contemporaneous interpretation). EPA's interpretation has been thoroughly reviewed, found reasonable and consistent with the statute, and affirmed by both the D.C. Circuit and the Sixth Circuit. *See Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) (upholding EPA position that "added" means "introduction of pollutant to water from outside world" as reasonable construction of statutory terms); *Gorsuch*, 693 F.2d at 167 (concluding that EPA interpretation is entitled to great deference because it was made by the regulatory agency charged with enforcing the statute, was consistent and contemporaneous, reflected agency expertise, was thorough, and was a reasonable interpretation of the

statutory terms, taking into account both specific terms and policies of the Act).

The Eleventh Circuit scorned any argument about EPA's interpretation, claiming that it could "ascertain no EPA position applicable to S-9 to which to give *any* deference, much less *Chevron* deference."[5] *Miccosukee*, 280 F.3d at 1368 n.4. How the Eleventh Circuit could conclude that EPA's interpretation of the very statutory terms at issue here was wholly irrelevant to the court's analysis, we cannot tell. Suffice it to say that Power Companies believe the court had an obligation to consider EPA's interpretation before substituting its own interpretation based largely on a selective reading of the Random House Dictionary and its uncritical acceptance of *Catskill Mountains*.

But even if this Court were to give no deference at all to EPA's interpretation, the Eleventh Circuit's contrary inter-

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[5] EPA has adopted a rule defining the "discharge of pollutants" in general terms. *See* 40 C.F.R. § 122.2 (2002). EPA has consistently said that that definition, and the accompanying permitting rules, do not apply to the passage of pollutants from one waterbody to another. Any argument that EPA's interpretation is not entitled to *Chevron* deference because it is just a "policy statement" is therefore inapposite. See *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In any case, requiring an agency to go through a rulemaking each time it decides *not* to regulate as the price of receiving *Chevron* deference does not seem to be what this Court had in mind in *Christensen v. Harris County*, 529 U.S. 576 (2000). In that case, the Court considered the amount of deference to be accorded a Department of Labor opinion letter setting conditions for compensatory time payments, where those conditions were not authorized by the statute. The Court said the opinion letter deserved "respect," but only to the extent the opinion had the "power to persuade." *Christensen*, 529 U.S. at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The Court considered the Department's opinion but did not find it persuasive given the specific terms of the statute. Here the Eleventh Circuit has not considered EPA's interpretation of the specific terms of the statute or explained why it is not apposite or does not have the "power to persuade."

pretation would fail on its own merits. The Eleventh Circuit's theory of what constitutes an addition "from" a point source is based primarily on the dictionary, the *Random House Dictionary of the English Language* 770 (2d ed. 1987), to be precise. See *Miccosukee*, 280 F.3d at 1368 n.6. From among the multiple definitions there, the court selected two; it says that "from" can mean "agent or instrumentality" or "cause or reason." *Id.* These two the court prefers to "source or origin" or its use as a preposition "used to specify a starting point in spatial movement." *See Random House Dictionary of the English Language* 770 (2d ed. 1987). Based on its selection, the court then leaps to the conclusion that "from" means "by" and that the relevant inquiry therefore is whether "but for the point source—the pollutants would have been added to the receiving body of water." An addition from the point source occurs, says the court, if a point source is the cause-in-fact of the release of pollutants into navigable waters. *Miccosukee*, 280 F.3d at 1368. One might summarize the logic this way:

> from = agent, instrumentality, cause or reason = by = cause-in-fact.

Even if the court's tour of the dictionary made sense, which we submit it does not, the Eleventh Circuit was not entitled to select its favorite definition, rather than other, equally plausible definitions, and apply it without regard to other applicable statutory provisions or relevant precedent.

Yet this is just what the court did. In essence, it concluded that a distinct navigable water containing pollutants equals a pollutant from the outside world and that routing navigable waters from one segment to another through a pump equals an addition of pollutants from the pump. Other than the (admittedly laudable) goal of preventing pollution, it cites no legislative authority for this proposition. As we show in the following discussion, there is none.

Moreover, the Eleventh Circuit's taking for itself the job of defining what is a distinct "waterbody" runs afoul of EPA policy. For about a decade EPA has been encouraging a "watershed approach" to regulating water quality. G. Tracy Mehan, III, Committing EPA's Water Program to Advancing the Watershed Approach (December 3, 2002), *available at* http://www.epa.gov/owow/watershed/memo.html. Part of this approach calls for empowering States to define the watersheds or waterbasins that are to be used as management units. See EPA, Implementing the Guiding Principles through State and Tribal Watershed Approaches, *available at* http://www.epa.gov/owow/watershed/framework/ch6.html. As EPA says, "for large river basins or lakes, state and tribal agencies are likely to lead watershed planning efforts, while local government, conservation districts, and watershed councils may take the lead in developing and implementing solutions in smaller watersheds." *Id.* In this respect EPA's policy, both past and present, is diametrically opposed to the Eleventh Circuit's approach of having different waterbodies defined by federal courts.

We might add that the Eleventh Circuit's decision raises a host of issues that the court appears not to have recognized. Even leaving aside the question of what constitutes a different waterbody (a question, and possibly a complex one, both of law and of hydrology), how is one to know when natural water is polluted enough to become a "pollutant"? Probably the court below intended to require a permit only when the water moved is by some definition "dirtier" than the water in the receiving waterbody. But what if the pumped water is *lower* in pollutants than the receiving water? Under the Eleventh Circuit's reasoning this would still be the "discharge of pollutants" so long as the pumped water had any nonwater molecules in it at all, though we doubt the court intended that result. The effect of the decision below is really to re-write the Clean Water Act, but without the deliberation that accompanies legislative action.

We are told that the S-9 pump discharges have been permitted by the State under the Everglades Forever Act, FLA. STAT. ch. 373.4592(9)(k) & (l) (2002). The permit requires the facility to meet all State water quality standards. Moreover the C-11 Basin and WCA-3A area have been consistently treated as parts of a single system by State and federal regulators and legislatures. It is astonishing that the Eleventh Circuit would decide what is a separate waterbody for regulatory purposes without even considering what State law says about the question, let alone the complex hydrological facts that might be relevant.

III. THE ELEVENTH CIRCUIT'S INTERPRETATION IS NOT SUPPORTED BY LEGISLATIVE HISTORY OR CONSISTENT WITH OTHER PROVISIONS OF THE CLEAN WATER ACT

As EPA and reviewing courts have recognized, the NPDES program is not the exclusive method by which Congress intended to meet the Act's goals. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). Congress defined the term "pollution"[6] more broadly than the term "discharge of pollutants," and it established separate programs for "nonpoint sources" causing pollution. *See* Clean Water Act §§ 208, 319, 33 U.S.C. §§ 1218, 1329 (1994 & Supp. V 2000). Clearly, it understood that nonpoint sources can have serious water quality consequences.[7] Yet it

[6] Under the Clean Water Act, "pollution" means "the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water." Clean Water Act § 502(19), 33 U.S.C. § 1362(19) (1994).

[7] Indeed, Congress required States to identify waters that would not meet water quality standards due to nonpoint sources. See Clean Water Act § 319(a)(1)(A), 33 U.S.C. § 1329(a)(1)(A) (1994).

also understood that requiring such sources to get an NPDES permit, with all of the associated effluent limits, monitoring requirements, and liabilities, would be inappropriate or even impossible for some sources. *See Gorsuch*, 693 F.2d at 176.

There is no evidence, either in the legislative history or elsewhere, that Congress would have considered a water transfer like the one in this case a candidate for NPDES regulation. In fact, all the evidence points the other way. The D.C. Circuit, examining the legislative history, found that "[t]hroughout its consideration of the Act, Congress' focus was on traditional industrial and municipal wastes . . . ." *Id.* at 175.

Even more important, Congress inserted two specific provisions, highly relevant to this question, which the Eleventh Circuit failed to consider. The first is Clean Water Act § 101(g), which reads as follows:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otnerwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

Clean Water Act § 101(g), 33 U.S.C. § 1251(g) (1994).[8] Prohibiting the Water Management District from pumping

[8] The legislative history shows that Congress intended to preserve State allocation of water. "The requirements of section 402 and 404 permits may incidentally affect individual water rights. . . . It is not the purpose of this amendment to prohibit those incidental effects. *It is the purpose of this amendment to insure that State allocation systems are not subverted,*

water between the C-11 Canal and the WCA-3A area would interfere with the State's authority to allocate water resources—that is, to put water where it is needed and keep it away from places where it is harmful—with disastrous consequences.[9] While the court acknowledged that shutting down the S-9 pump was unwarranted, it seems to have assumed without discussion that the District could solve the problem just by getting a permit.

But the NPDES permit program is particularly unsuited to activities of this kind, for the obvious reason that the Water Management District does not control the "pollutants" in the first place. These pollutants come from other sources in Broward County, which the District cannot anticipate or control. The only factor the District can control is whether or not the pump operates; there is no other place to put the water, which comes to the District in a quantity and quality that it cannot control. How is the District to design a treatment system under these circumstances? What if the point and nonpoint sources that actually contribute the pollutants change over time? What technology should it use? For what pollutants should it plan to treat? For what should it monitor? How are permit limits to be set, and what happens if those limits are exceeded? For the "discharges of pollutants" over which EPA has exercised jurisdiction under the NPDES program, those questions are relatively easy to answer. But when the same questions are asked in this case,

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and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations. This amendment is an attempt to recognize the historic allocation rights contained in State constitutions" (emphasis added). 3 *A Legislative History of the Clean Water Act of 1977*, 95th Cong., 2d Sess. 532 (Oct. 1978) (Senate Debate of Dec. 15, 1977).

[9] Even the Eleventh Circuit agrees that the consequences would be disastrous—so disastrous that it vacated the district court's injunction. *Miccosukee*, 280 F.3d at 1371.

there is no logical answer at all. The only real answer would have the Water Management District build a new water management system that sends the water elsewhere. But that result would violate the policy expressed in § 101(g).

Less than three years ago this Court, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), held that where an administrative interpretation of a statute invokes the outer limits of Congress' power, the Court expects a "clear indication that Congress intended that result." 531 U.S. at 172. Yet here the Eleventh Circuit's decision federalizes the entire corpus of state water resources law and threatens to replace the mechanisms the States have developed for allocating water with the federally imposed NPDES permit program, even though Congress gave no indication at all that that was its intent. The problems of federalism would be severe if, for example, a State authorized a diversion of water but EPA disagreed with the State's decision and vetoed the diversion under Clean Water Act § 402(d)(2), 33 U.S.C. § 1342(d)(2). There is absolutely no indication in the legislative history that Congress intended such a result.

The Eleventh Circuit cited no evidence in the statute or the legislative history that Congress intended to require NPDES permits for the movement of water, and we know of none. It is implausible that Congress would have intended this result, for one simple reason: the way that pollutants are regulated under the NPDES permit program is to impose permit limits, based on what available control technology can accomplish and what is needed to meet instream water quality criteria. For reasons outlined elsewhere in this brief, there is no apparent way to set permit limits for phosphorus, for example, in water that is collected in a canal through a drainage basin, let alone numeric limits for the other "pollutants" that are always present in the same water.

Section 304(f) of the Act also gives clear evidence of Congress' intent that water management activities of this kind be treated as "nonpoint source" "pollution." In pertinent part it provides as follows:

> **§ 1314(f). Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution**
>
> * * *
>
> The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from–
>
> * * *
>
> (F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Clean Water Act § 304(f), 33 U.S.C. § 1314(f) (1994).

Although EPA has suggested that § 304(f) does not preclude it from regulating any aspect of an activity that changes water flow or diverts water as a "point source," it has argued that it is a clear indication that Congress intended such activities generally to be treated as nonpoint sources. See *Gorsuch*, 693 F.2d at 168. As discussed above, this is exactly what EPA has done.

The Eleventh Circuit never mentions this clearly rele vant language. The Second Circuit decision on which the

Eleventh Circuit relies for support, *Catskill Mountains*, dismisses both these provisions with almost no discussion on the ground that they are irrelevant in light of the "plain meaning of its text." *Catskill Mountains*, 273 F.3d at 494.

The Power Companies submit that the Eleventh and Second Circuits' interpretation is unsupported by the "plain language" of the statute, inconsistent with prevailing EPA interpretation and applicable precedent, and contradicted by other statutory provisions.

IV. HOLDING THE WATER MANAGEMENT DISTRICT RESPONSIBLE FOR POLLUTANTS IT CANNOT ANTICIPATE OR CONTROL WOULD VIOLATE DUE PROCESS

To hold the Water Management District (and others similarly situated) responsible for someone else's pollutants, which the District can neither anticipate nor control, would violate the Due Process Clauses of the Fifth and Fourteenth Amendments because the means is not rationally related to the end. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 14-15 (1991).

In determining whether a provision holding one party responsible for another's acts has a rational basis, the key is control. For example, a State may hold an innocent employer liable for an employee's fraudulent acts, within the scope of employment, because the State could rationally conclude that such a strict liability rule would make the employer "more likely to prevent an agent's fraud." *Id.* at 14. By contrast, a point source has no power to control what pollutants other sources add, and it likewise cannot control pollutants naturally present in its intake water. Indeed, a discharger cannot even anticipate what pollutants or pollutant levels will appear in its intake water until the water is actually

withdrawn.[10] There is simply nothing a discharger can do that will enable him or her to control what pollutants are introduced by others or by nature.

It was this lack of control that led the court in *American Iron & Steel Institute v. EPA*, 526 F.2d 1027, 1056 (3d Cir. 1975), *amended on other grounds*, 560 F.2d 589 (1977), *cert. denied*, 435 U.S. 914 (1978), to conclude that "an adjustment [in effluent limitations to account for intake pollutants] would seem required by due process, since without it a plant could be subjected to heavy penalties because of circumstances beyond its control."

In *American Iron & Steel Institute* the steel industry successfully argued that EPA's technology-based regulations were defective because, among other things, they established limitations on a gross, rather than a net, basis. Otherwise, the dischargers argued, they "would be forced to clean up water . . . polluted by other companies." *Id.* at 1056. The court agreed and instructed EPA to revise the rules to "establish precise guidelines" for allowing intake pollutant credits, including the instances when such credits *must* be allowed. *Id.; see also American Petroleum Inst. v. EPA*, 540 F.2d 1023, 1034-35 (10th Cir. 1976), *cert. denied*, *Exxon Corp. v. EPA*, 430 U.S. 922 (1977).

The NPDES program's purpose is to "control, on a source by source basis the discharge of pollutants into navigable waters." S. Rep. No. 92-414 at 70 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3736. Holding dischargers liable for pollutants they cannot control is not rationally related to that

[10] Holding a discharger liable for background pollutants would also violate due process in the procedural sense, since dischargers would be responsible for pollutants in intake water whether or not those pollutants were present when its permit limits were established. Dischargers would not have, with respect to such pollutants, the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

purpose, since it will not result in the control of the actual sources of those pollutants, which have already "added" the pollutant to navigable waters.

The court below found that an NPDES permit is needed to pump impure water into "another distinct body of navigable water." *Miccosukee*, 280 F.3d at 1368. It rejected the Water District's argument to the contrary. *Id.* at 1369 n.8. Yet at the same time the court recognized that without the human improvements both sides of the levees would "essentially be a single body of water." *Id.* In this respect the court's decision is internally inconsistent. Moreover, the complexity of the hydrological question of whether the two sides are one waterbody or two makes it unsuitable for summary judgment, and the court's taking for itself the authority to decide this issue without resort to State water resources law raises serious questions about the State-federal relationship. In such a case the statute should be interpreted to avoid such constitutional issues. *See Solid Waste Agency of Northern Cook Co. v. United States Army Corps of Engineers*, 531 U.S. 159, 172 (2001); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

CONCLUSION

The Supreme Court's intervention in this case is much needed. The Eleventh Circuit opinion threatens to change the Clean Water Act from a statute regulating "discharges of pollutants" from "point sources" to a statute regulating water resources generally in a freewheeling, knows-no-bounds fashion, all based on the Random House Dictionary.

The Clean Water Act is not a generalized mandate to regulate all water pollution but a detailed program of specific statutory words. This Court needs to bring the statute back to earth by overturning the Eleventh Circuit's decision in this

case as inconsistent with the wording, legislative history, administrative interpretation, and case law pertaining to the NPDES program.

Respectfully submitted,

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September 10, 2003